



DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
2 NAVY ANNEX  
WASHINGTON DC 20370-5100

JRE  
Docket No: 4148-97  
10 August 2000

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: FORMER [REDACTED]  
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments  
(2) Neuro ltr 6320, 28 Jan 00  
(3) Director, NCPB ltr 5420 Ser:00-08, 27 Apr 00  
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show that he was retired by reason of physical disability with a combined rating of 70%, that he be given a rating for a brain injury in accordance with the Veterans Administration Schedule for Rating Disabilities (VASRD), and that his request be submitted to the Surgeon General of the Navy for evaluation of the medical evidence and assignment of a disability rating for the traumatic brain injury..

2. The Board, consisting of Ms. Schnittman and Messrs. Bishop and Carlson, reviewed Petitioner's allegations of error and injustice on 13 July 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. On 3 June 1993, the Record Review Panel (RRP) of the Physical Evaluation Board (PEB) made preliminary findings that Petitioner was unfit for duty because of right upper extremity weakness due to brachial plexus injury, rated at 70% under VA code 8513. He also had a traumatic brain injury, herniated intervertebral disc, L4-5, with low extremity

weakness, and a stable maxillary comminuted fracture, which were classified as category III conditions, i.e., not unfitting or contributing to the unfitting condition. Petitioner conditionally accepted those findings, contingent upon his being permitted to remain on active duty in a limited duty status to complete twenty years of active service. He also stipulated that in the event that his conditions were not met, he demanded a hearing before the PEB. The Commandant of the Marine Corps determined that his services could not be utilized in a limited duty status, and requested that the disability proceedings be continued to conclusion. On 16 December 1993, after consultation with his counsel, Petitioner withdrew his demand for a hearing, and accepted the preliminary findings of the RRP. He was released from active duty on 25 March 1994, and transferred to the Temporary Disability Retired List (TDRL) the following day. He had completed 17 years, 8 months and 19 days of active service. On 14 June 1995, the VA awarded Petitioner a combined rating of 70%, as follows: splenectomy, 30%; degenerative joint disease of lumbosacral spine with laminectomy/discectomy and L5 radiculopathy, 20%; scars of face and neck, 10%; degenerative joint disease of left knee status post medial meniscectomy, 10%; brain trauma with history of forgetfulness, 10%; degenerative joint disease of right hip, 10%; and 0% for arthralgia of right shoulder, status/post fracture of maxilla and mandible.

d. On 30 May 1996, the RRP made preliminary findings that Petitioner remained unfit for duty because of the right upper extremity weakness, which it rated at 20%. Petitioner rejected those findings, and demanded a hearing. He appeared before a hearing panel of the PEB on 5 September 1996, and requested a combined rating of 50%, for the upper extremity weakness, traumatic brain injury, and the lower back condition. The hearing panel determined that at the time of his placement on the TDRL, there was no issue that he was unfit because of the residuals of his head trauma. In addition, the hearing panel determined that there was no evidence that he had any disability related to his head injury at the time the hearing was conducted. With regard to the back condition, the hearing panel determined that there was no evidence indicating that the condition was unfitting. The hearing panel noted that objective findings seemed to indicate that Petitioner's brachial plexus injury had resolved; however, his subjective complaints suggested ongoing problems with weakness and fine muscular coordination. The hearing panel noted that Petitioner felt he was not fit for duty, because he could not qualify with a pistol, complete the physical fitness test, or use a typewriter. The hearing panel concluded that he was unfit for duty because of right upper extremity weakness rated at 20%. On 4 November 1996, Petitioner submitted a Petition for Relief from Final Action of the PEB, in which he requested that the findings of the PEB be set aside, and that the case be remanded for more medical testing. The petition was denied by the Director, Naval Council of Personnel Boards (NCPB) on 5 December 1996. On 10 December 1996, the President, PEB, requested that the Commandant of the Marine Corps effect Petitioner's separation from the Naval Service, with entitlement to disability severance pay but without further disability benefits administered by the Department of the Navy.

e. In correspondence attached as enclosure (2), the Specialty Advisor for Neurology advised the Board, in effect, that the available evidence establishes that Petitioner sustained a significant upper motor neuron impairment and possibly cognitive problems as a result of the

traumatic brain injury he sustained in 1992. The determination that he was competent to manage his own financial affairs does not prove that he had normal cognitive function, as a patient can be impaired but competent. His upper motor neuron function did not resolve, and there remain demonstrable sequelae. The neurology advisor noted that the PEB ascribed all of Petitioner's upper extremity symptoms to the brachial plexus injury, and selectively used the opinions of expert neurologists to "refute the objectivity of this injury, but down plays their opinion on the brain injury. Therefore, they selectively ignored the objective clinical evidence of brain injury, and ascribe all the patient's symptoms to the 'subjective' brachial plexus injury." In the neurology advisor's opinion, Petitioner's most significant injury has been essentially ignored and "uncompensated." He recommended that Petitioner be compensated for his significant brain injury, which he believes will probably adversely affect Petitioner's employability and quality of life forever.

f. In correspondence attached as enclosure (3), the Director, NCPB, advised the Board, in effect, that the report of the neurology advisor makes an effective case for reconsideration of the influence of the traumatic brain injury, but it provides little additional basis for "quantifying any resulting increase in disability." He noted that VA code 8045 has no minimum rating for brain trauma per se. In the case of the brain, there are two primary classes of end-organs: the mind/psyche, which encompasses cognitive/emotional/behavioral impairment; and the soma, which encompasses specific peripheral, sensory and/or motor nerve impairments. In the director's opinion, there is little evidence to suggest, let alone provide the basis for a separate unfitness rating, that Petitioner suffers from a psychiatric impairment. With regard to the soma class, he noted that Petitioner's weakness may, in part, be attributable to brain trauma. This has conceptual and treatment implications, but does not in and of itself appear to warrant alteration of the disability rating in this case. In summary, he concluded that Petitioner was not entitled to a disability rating in excess of 20%. He did recommend, however, that the traumatic brain injury be elevated from category III, not separately unfitting of contributing to the unfitting condition, to category II, as a conditions contributing to the unfitting condition. He noted that the classification of the brain trauma in that category allows future reassessment of his case and a possible additional rating should Petitioner provide evidence of brain trauma related impairments incurred prior to expiration of his TDRL status.

g. In correspondence submitted in response to the comments of the Director, NCPB, Petitioner's counsel contends, in effect, that the director is a line officer, who is completely without the professional qualifications to assess or opine on Petitioner's "unaccounted for neurological deficits." He notes that the neurology advisor stated that Petitioner's "problems are mostly due to his brain injury." With regard to the director's statement to the effect that there is little evidence of psychiatric impairment, Petitioner's counsel submitted a learning disabilities evaluation produced prior to his placement on the TDRL, which indicates that Petitioner had "very slow organizational ability for writing...Attentional and concentrational problems seem to interfere with his ability to perform optimally." His "lower end of average to below average performance scores" on an educational battery "most likely are also

impacted by the head trauma he suffered in the 1992 automobile accident." The learning disabilities specialist concluded "His disabilities most certainly have some result from the traumatic head injury he suffered and impact dramatically in left-brain functions of language." Counsel reiterated the neurology advisor's conclusion that the PEB had selectively ignored the objective clinical evidence of brain injury and ascribed all his symptoms to the subjective brachial plexus injury. Counsel maintains that the Navy has adopted the VASRD for use in determining entitlement to disability retirement, and that the VASRD requires that reasonable doubt be resolved in favor of the claimant. In this case, the PEB failed to credit Petitioner with a rating for his brain injury, even though there was upper motor neuron dysfunction which has not resolved and for which there were demonstrable sequelae. He contends that under the VASRD such an injury would qualify for a rating at the very least on the basis of his reported and documented subjective complaints, such as memory loss. Accordingly, he contends that where, as in this case, there is reasonable doubt about whether the brain injury "should be rated - a zero rating - or rated at 10% for subjective complaints of memory loss, loss of cognitive functioning", the proper course would have been to rate the brain injury and accord it, as a minimum, a 10% rating.

#### CONCLUSION:

Upon review and consideration of all the evidence of record and notwithstanding the comments contained in enclosure (3), the Board concludes that Petitioner should have been permanently retired by reason of physical disability upon the removal of his name from the TDRL.

The Board was not persuaded that the residuals of Petitioner's splenectomy, degenerative joint disease of lumbosacral spine with laminectomy/discectomy and L5 radiculopathy, scars of face and neck, degenerative joint disease of left knee status post medial meniscectomy and degenerative joint disease of right hip did not, either singly or in combination, render Petitioner unfit for duty, or contribute to an unfitting condition. As such, those conditions were not ratable.

The Board notes that the Director, NCPB, is authorized to take final action for the Secretary of the Navy on all disability evaluation matters properly before him. He has medical and legal advisors on his staff, from whom he receives advice prior rendering an advisory opinions to the BCNR. As indicated above, he acknowledged that Petitioner suffered from a traumatic brain injury which contributed to the unfitting condition of upper extremity weakness. He did not, as counsel implies, reject the findings of the neurology advisor. In the opinion of the Director, NCPB, the determination of the specific cause of Petitioner's upper extremity weakness is of little import because the impairment would have been rated as 20% regardless of whether it had been classified as a residual of brain trauma or a brachial plexus injury. The Board substantially concurs with that determination. It notes, however, that Petitioner does have mild cognitive impairment associated with brain trauma, as well as subjective residual symptoms, such as memory loss, which the VA rated at 10%. Given the totality of the circumstances in this case, and particularly his long and faithful

service in the Marine Corps, the Board concludes it would be in the interest of justice to assign a 10% to the traumatic brain injury, for a combined rating of 30%.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:


a. That Petitioner's naval record be corrected to show that he was not discharged from the Marine Corps by reason of physical disability.

b. That Petitioner's naval record be further corrected to show that the Secretary of the Navy found him unfit to perform the duties of his rank by reason of physical disability due to right upper extremity weakness residual to brachial plexus injury, rated at 20% under VA code 8513, and traumatic brain injury, rated at 10% under VA code 8450, for a combined rating of 30%; and that as accepted medical principles indicate the disability is of a permanent nature, the Secretary directed that Petitioner be permanently retired by reason of physical disability pursuant to 10 U.S. Code 1201, effective on the date of the discharge set aside in recommendation a. above.

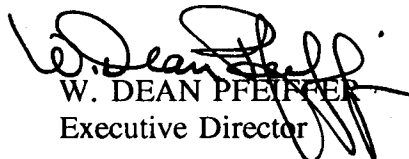
c. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

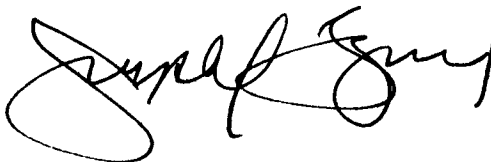
ROBERT D. ZSALMAN  
Recorder

  
JAMES R. EXNICIOS  
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.

  
W. DEAN PFEIFFER  
Executive Director

Reviewed and approved:

 10-12-00

Joseph G. Lynch  
Assistant General Counsel  
(Manpower & Reserve Affairs)